Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 87-1316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

In Re: L. NAPOLEON COOPER d/b/a
LARRY N. COOPER the Proprietorship

**On Writ of Mandamus and Prohibition
in the Alternative to the
United States Court of Appeals
for the District of Columbia Circuit**

OPPOSITION TO PETITION FOR WRIT TO ISSUE

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Question Presented

Whether in summarily affirming dismissal of this action, the United States Court of Appeals for the District of Columbia Circuit exceeded its jurisdiction.

List of Parties Required by Supreme Court Rule 28.1

Dow Jones & Company, Inc., *The Wall Street Journal*, Peter G. Skinner, William Cummings and David E. Moran (hereinafter Dow Jones) hereby state that:

a. Dow Jones & Company, Inc. is the exclusive owner and publisher of *The Wall Street Journal.*

b. Dow Jones & Company, Inc. does not have a parent company, subsidiaries or affiliates.

c. Dow Jones & Company Inc., is a minority shareholder in Telerate, Inc., One World Trade Center, New York, New York.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES REQUIRED BY SUPREME COURT RULE 28.1	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
REFERENCE TO OPINIONS AND JUDGMENTS DELIVERED BY THE COURTS BELOW	1
APPLICABLE STATUTES AND RULES	2
STATEMENT OF THE CASE	6
A. Statement of Proceedings	6
B. Statement of Material Facts	7
REASONS FOR DENYING A WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION	11
A. Extraordinary Writs	11
B. The Court of Appeals Had the Power to Hold Summary Proceedings On Cooper's Appeal	13
C. The Court of Appeals Correctly Affirmed the Judgment of the District Court	14
1. The Complaint Fails to State a Cause of Action Under the Antifraud Provision of the Williams Act	15
2. The Complaint Fails to State a Cause of Action Under the Robinson-Patman Act	17
3. The Complaint Fails to State a Claim Under the Sherman Act	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:	Page
Allied Chemical Corporation v. Daiflon, Inc., 449 U.S. 33 (1980)	11,12
Ambook Enterprises v. Time Inc., 612 F.2d 604 (2nd Cir. 1979) *cert. dismissed*, 448 U.S. 914 (1980)	18
Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983)	19
Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953)	12
Barnes v. United States, 678 F.2d 10 (3rd Cir. 1982)	13,14
Bird and Son, Inc., 25 FTC 468 (1937)	18
Bruce's Juices v. American Can Co., 330 U.S. 743 (1947)	18
Collier v. United States, 382 U.S. 890 (1969)	12
Conley v. Gibson, 355 U.S. 41 (1957)	14
Copperweld Corp. v. Independence Tube Corp., 476 U.S. 752 (1984)	19
Diamond v. World News Corp., 542 F. Supp. 887 (S.D.N.Y. 1980)	19
Glick v. Koenig, 766 F.2d 265 (7th Cir. 1985)	13,14
H.A.B. Chemical Co. Inc. v. Eastman Kodak Co., 1981-1 Trade Cases (CCH) ¶ 63,912 (C.D. Cal. 1980)	18
Hanson Trust PLC v. SCM Corp., 774 F.2d 47 (2d Cir. 1985)	16
Jaffke v. Dunham, 352 U.S. 280 (1957)	13
Martin Trigona v. Smith, 712 F.2d 1421, *on remand* 600 F. Supp. 1184 and 600 F. Supp. 1193, *affirmed* 818 F.2d 95 (D.C. Cir 1987)	13

Table of Authorities Continued

	Page
Matter of Bankers Trust Co., 775 F.2d 545 (3rd Cir. 1985)	12
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	17
National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81 (D.D.C. 1977), *aff'd. mem.* 595 F.2d 888 (D.C. Cir. 1979)	18
Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977)	15
Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943)	11
SEC v. Carter Hawley Stores, 760 F.2d 945 (9th Cir. 1985)	16
S-G Securities Inc. v. Fuqua Investment Co., 466 F. Supp. 1114 (D. Mass. 1987)	16
Times Picayune Publishing Co. v. United States, 345 U.S. 594 (1953)	18
Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976)	11
United States v. Duell, 172 U.S. 576 (1899)	12
United States v. Taylor, 798 F.2d 1337 (10th Cir. 1986) *reh'g denied*	12
Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979)	15,16
Will v. United States, 389 U.S. 90 (1967)	11,12
TEXTS	
F. Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962)	17,18
Patman, *Complete Guide to the Robinson Patman Act* (1963)	18
STATUTES	
Securities and Exchange Act of 1934 § 14(e), 15 U.S.C. § 78n(e) (West 1981)	15

Table of Authorities Continued

	Page
Robinson-Patman Act § 2(e), 15 U.S.C. § 13(e) (West 1981)	15,17
Sherman Antitrust Act, 15 U.S.C. § 1 (West Supp. 1987)	15,19
28 U.S.C. § 1291 (West 1987)	4,13
28 U.S.C. § 1651 (West 1981)	3,11
28 U.S.C. § 2106 (West 1982)	3,13
RULES	
Federal Rule Appellate Procedure 2	3,14
Fed. R. Civ. P. 12(b)	4-5,14

Reference to Opinions and Judgments Delivered by the Courts Below

Reference is made to the Order and Memorandum of the United States District Court for the District of Columbia dated July 29, 1986. Relying on Rule 11, the District Court dismissed this action as frivolous. Petitioner's Appendix (Pet. App.) 5, 6-8.

Reference is also made to the *Per curiam* Order of the United States Court of Appeals for the District of Columbia Circuit dated July 30, 1987 In pertinent part, the Court of Appeals (Starr, J., Silberman, J. and McGowan, S.J.) ordered all parties to show cause why the District Court's judgment should not be affirmed. Pet. App. 9.

Reference is also made to the *Per curiam* Order and Memorandum of the United States Court of Appeals for the District of Columbia Circuit dated October 9, 1987. The Court of Appeals, (Wald, C.J., Mikva, J. and Edwards, J.) summarily affirmed the District Court, but on different grounds. The Court of Appeals found that petitioner had failed to state a cause of action upon which relief could be granted. Pet. App. 12, 13-20.

Statement of Jurisdiction

The judgment of the United States District Court for the District of Columbia was filed on July 29, 1986, dismissing petitioner's complaint. The United States Court of Appeals for the District of Columbia summarily affirmed on October 9, 1987. Cooper's petition for rehearing was denied on November 10, 1987. Petitioner has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1651 (West 1981).

Applicable Statutes and Rules

Section 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78n(e) (West 1981) provides:

> "It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonable designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e) (West 1981) provides:

> "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon

terms not accorded to all purchasers on proportionally equal terms."

Section 1 of the Sherman Act, 15 U.S.C. § 1 (West Supp. 1987), provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

28 U.S.C. § 1651 (West 1966) provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2106 (West 1982) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropri-

> ate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

28 U.S.C. § 1291 (West 1987) provides:

> "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

Rule 2 of the Federal Rules of Appellate Procedure provides:

> "In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provision of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction."

Fed. R. Civ. P. 12(b) provides:

> "(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or

third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as on for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Statement of the Case

A. Statement of Proceedings

On February 10, 1986, petitioner L. Napoleon Cooper (hereinafter Cooper) instituted this action for over $78 million in damages and injunctive relief against Dow Jones, General Electric Company (GE), RCA Corporation (RCA), and Lazard Freres & Company (Lazard) alleging violations of Section 14(e) of the Securities and Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78n(e) (West 1981), Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (West Supp. 1987), and Section 2(e) of the Robinson-Patman Antidiscrimination Act, 15 U.S.C. § 13(e) (West 1973). Jurisdiction was asserted pursuant to § 27 of the 1934 Act, § 4 of the Clayton Act, as well as 28 U.S.C. § 1337 (jurisdiction for actions affecting commerce), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1332 (diversity).

With respect to Dow Jones, Cooper requested compensatory and punitive damages under the antitrust and securities counts, declaratory judgment concerning the alleged illegal actions, and an order that any contract between Dow Jones and the remaining appellees be declared void. He made similar claims against GE, RCA and Lazard.

In essence, Cooper charged that the respondents violated § 14(e) of the 1934 Act by conspiring to withhold information about a prospective offer by him to purchase 4.999% of RCA stock from stockholders. Cooper also alleged antitrust violations by Dow Jones in refusing to sell space to him to advertise his purported offer to purchase RCA and twenty-seven other companies simultaneously.

Cooper sought, and was denied, injunctive relief. Thereafter, all respondents moved to dismiss the action as frivolous. Cooper opposed these motions. On July 29, United States District Judge Harold H. Greene granted respondents motions, dismissing the action as frivolous. Pet. App. 5, 6-8.

On August 4, 1986, Cooper appealed this matter to the United States Court of Appeals for the District of Columbia Circuit. Cooper demanded, but did not receive, emergency relief.

On July 30, 1987, the Court of Appeals, acting on its own motion, directed the parties to show cause why the District Court's decision should not be summarily affirmed. Pet. App. 9-10. Cooper, Dow Jones, Gesub, RCA and GE timely responded to the show cause order. Only petitioner Cooper opposed summary affirmance.

On October 9, 1987, the Court of Appeals affirmed the decision of the District Court, but for different reasons. Pet. App. 12, 13-20. The Court of Appeals found that Cooper had failed to state a cause of action upon which relief could be granted. Fed. R. Civ. P. 12 (b) (6).

On October 23, 1987, Cooper petitioned the Court of Appeals for a rehearing. The petition was denied on November 10, 1987. On February 8, 1988, Cooper applied to this Court for a writ of mandamus or, alternatively, prohibition.

B. Statement of Material Facts

L. Napoleon Cooper is an individual citizen of Louisiana trading as Larry N. Cooper the proprietorship. In both capacities, Cooper is promoting a charitable

program identified by him as "Project 76-An American Affair, Inc." (Project 76). Affidavit of L. Napoleon Cooper sworn to February 20, 1986 (hereinafter Cooper Affidavit) ¶ 20.[1] Project 76 is an unfunded charitable entity (Cooper Affidavit, ¶ 6) dedicated to

> implementation [of a] mechanism whereby *America's major for-profit companies would (with shareholder approval)* assume a primary *supplemental* responsibility for the creation of a working relationship with the nation's non-profit sector to [privately] finance and administer the delivery of basic public works, services and social welfare activities (in association with and to the specifications of federal, state and local governments).
> (Emphasis in the original.)

Cooper Affidavit ¶ 20.

During the six years or so preceding the filing of this action, Cooper approached twenty-eight Fortune 500 companies with prospective offers to buy 4.999% of each company. Cooper Affidavit, ¶ 15. Cooper planned to finance his purchases by issuing high-risk, high-yield debt instruments secured by the respective company's equity voluntarily donated by shareholders. *Id.*, ¶ 6. Cooper made no other arrangements for financing his proposed acquisitions. Id., ¶ 7. Dow Jones, RCA, and GE were among the companies Cooper approached seeking donations for his scheme. *See* Pet. App. 41-47.

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[1] For purposes of this proceeding, all the well-pleaded facts alleged in the complaint and the Cooper Affidavit are accepted as true.

Skinner advised Cooper that the owners of Dow Jones were not interested in his proposal. Cooper made no further attempt to acquire Dow Jones shares.

RCA and GE, among others, did not respond to Cooper's initial solicitation and Cooper specifically pressed them for a response. On November 21, 1985, Cooper submitted a prospective "offer to purchase" to RCA for 4.999% of its common stock. The tentative offer price consisted of a $6.50 cash coupon and a renewable $21.51 one-time tax deduction. Pet. App. 27-28. The total face amount of the offer was less than $300 million.[2] Cooper's only means of financing his offer was by charitable donations from RCA stockholders willing to give their equity to his project.[3] Neither GE nor RCA responded to Cooper's offers.

On October 19, 1985, Cooper contacted *The Wall Street Journal* (hereinafter the *Journal*) seeking information concerning purchasing advertising for charitable activities. By letter dated November 6, 1985, the Journal provided the requested information. Pet. App. 25.

On November 25, in a telephone conversation, Cooper's request to buy space to advertise his planned offer to purchase 4.999% of RCA, GE, and twenty-six other companies, was rejected by Cummings and the *Journal*. *See* Pet. App. 23-29. On December 5, 1985, also in a telephone conversation, Moran con-

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[2] $66.17 x 4,484,103 $296,713,895.51. Pet. App. 26-27.

[3] On the same date, November 21, 1985, Cooper made proposals of offers to purchase twenty-seven other companies, including GE. As with the RCA proposal, donation of stock equity was the only financing proposed. *See* Pet. App. 33, 38.

firmed the *Journal's* decision not to sell Cooper advertising space. This was later confirmed by letter. *See* Pet. App. 23, 25.

Dow Jones explained to Cooper that without substantially more supporting information about the planned offers of purchase, the *Journal* would not carry his advertisement. As submitted, the proposed advertisement was so vague and misleading that it was not publishable under the *Journal's* standards. Cooper concedes that he alone was denied the opportunity to purchase advertising space from the *Journal*. *See* Pet. App. 25.

On December 4, 1985, Cooper "began to dig" for evidence that the *Journal*, in conjunction with others, had agreed to never sell him the advertising space he desired." Pet. App. 25. The only evidence he located to support his suspicion arose out of an alleged conversation with an unnamed corporate executive. This unknown executive merely acknowledged Cooper's assertion that the *Journal* would not sell him space.[4] Cooper did not question the executive further. Cooper Affidavit, ¶ 26. Cooper presented no other evidence of an agreement between Dow Jones and any other party to refuse to sell him advertising space.

On February 13, 1986, following negotiations between the two companies, the RCA stockholders ac-

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[4] Cooper describes the conversation as follows: "By happenstance, the way the plaintiff [Cooper] raised the subject caused him to appear to be asking the executive if he was aware that 'I've had problems publishing the offer in the *Wall Street Journal*.' . . . [T]he executive immediately responded, 'yes'. . . ." Cooper Affidavit, ¶ 26.

cepted a merger with GE valued at $6.3 billion. The merger was later fully consummated.

Reasons for Denying a Writ of Mandamus or, Alternatively, Prohibition

Petitioner has not established any basis for this Court to issue either a writ of mandamus or a writ of prohibition. Extraordinary writs, such as mandamus and prohibition, are properly directed against a federal court that has either failed to perform a clear obligation, or exceeded its jurisdiction. *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-353 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967). Here, the actions of the Court of Appeals for the District of Columbia Circuit, both procedurally and substantively, were well within the court's authority and jurisdiction.

A. Extraordinary Writs

The All Writs Act, 28 U.S.C. § 1651 (West 1966) provides that extraordinary writs may issue as "necessary or appropriate in aid of their (courts created by Act of Congress) respective jurisdictions." As such, it is a "drastic remedy" and is only available in "extraordinary situations." *Allied Chemical*, 449 U.S. at 34.

Generally, in order to avoid piecemeal appellate litigation and promote judicial efficiency, mandamus has only been available, in connection with federal courts, in order "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26

(1943) quoted with approval at *Will*, 389 U.S. at 95 and *Allied Chemical*, 449 U.S. at 35. For similar reasons, the availability of writs of prohibition has also been restricted. *United States v. Taylor*, 798 F.2d 1337, 1340-1341 (10th Cir. 1986) *reh'g denied; Matter of Bankers Trust Co.*, 775 F.2d 545 (3rd Cir. 1985).

In order to obtain a writ of mandamus or prohibition, in connection with a federal court, the applicant must meet a two-part standard. First, the applicant must demonstrate that he lacks any "other means to obtain the relief he desires." *Allied Chemical*, 449 U.S. at 35. Second, the applicant must prove "[his] right to issuance of the writ is clear and undisputable." *Allied Chemical*, 449 U.S. at 35 quoting from *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) quoting from *United States v. Duell*, 172 U.S. 576, 582 (1899).

Here, neither standard has been met. First, Cooper had an alternate means of relief available—petition for certiorari. 28 U.S.C. § 1254.[5] Second, Cooper has not established a 'clear and indisputable' right to have a writ issue. In summarily affirming the judgment of the District Court, the Court of Appeals did not exceed its jurisdiction or authority, either procedurally or substantively.

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[5] This Court may, in its descretion, treat Cooper's application for an extraordinary writ as a petition for certiorari. *Collier v. United States*, 382 U.S. 890 (1969). As discussed *infra*, the issues present in this case do not merit review on a petition of certiorari.

B. The Court of Appeals Had the Power to Hold Summary Proceedings on Cooper's Appeal

Cooper contends, wrongly, that the Court of Appeals exceeded its authority in summarily affirming, following an order to show cause. *See* Petition 24-25, 59. 28 U.S.C. §§ 1291, 2106, and Federal Rule Appellate Procedure 2, provide the authority for the procedure utilized in the instant action.

28 U.S.C. §§ 1291 and 2106 grant federal appellate courts the authority to resolve appeals from final orders rendered by the lower courts. In part, it permits the appellate courts to affirm lower court decisions on any grounds supported by the record, not merely those relied upon by the lower court. *Jaffke v. Dunham*, 352 U.S. 280 (1957). Where the facts and legal issues have been fully presented, a federal appellate court may also dispose of appeals, summarily.[6]

In addition to having the authority to dispose of appeals summarily, appellate courts have the power to tailor the proceedings in a particular case to the

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[6] *See e.g. Glick v. Koenig*, 766 F.2d 265 (7th Cir. 1985) (Appeal could be decided without oral argument where the matter is frivolous, the dispositive issue has been recently authoritatively decided, or the facts and legal arguments are adequately presented in the briefs and record); *Martin-Trigona v. Smith*, 712 F.2d 1421, *on remand* 600 F. Supp. 1184 and 600 F. Supp. 1193, *affirmed* 818 F.2d 95 (D.C. Cir. 1987) (summarily dismissing appeal after careful review of the facts and the legal issues); *Barnes v. United States*, 678 F.2d 10 (3rd Cir. 1982) (holding "[t]here can be no dispute about our power to act summarily. Summary disposition by appellate courts, while not routine, is certainly not uncommon.")

facts and issues presented. Federal Rule of Appellate Procedure 2 provides that "[i]n the interest of expediting decision, or for other good cause shown, a court of appeals may . . . suspend the requirements or provision of any of these rules in a particular case . . . on its own motion and may order proceedings in accordance with its direction." Thus, the Court of Appeals for the District of Columbia Circuit had the power and the authority to dispense with the usual appeal process, issue a show cause order and hold summary proceedings.

Further, the Court of Appeals carefully considered the facts and the legal issues before issuing its decision. *Glick*, 766 F.2d at 265; *Barnes* 678 F.2d at 10. All parties were permitted to submit written responses to the order to show cause. Cooper and Dow Jones took the opportunity to submit lengthy memoranda with attachments. Finally, the Court of Appeals issued a written memorandum setting forth the issues on appeal, and, although it affirmed the District Court's judgments, it used a different rationale. Thus, the Court of Appeals gave this appeal due consideration and did not commit any procedural impropriety.

C. The Court of Appeals Correctly Affirmed the Judgment of the District Court

Rule 12(b)(6) provides for dismissal of actions which do not state a cause of action upon which the federal courts are empowered to provide a remedy. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This is just such an action.

Viewing the well-pleaded facts in the light most favorable to Cooper, the complaint and supporting

documents do not, as a matter of law, state a cause of action. Here, Cooper has alleged that Dow Jones committed violations of Section 14(e) of the 1934 Act 15 U.S.C. § 78n(e) (West 1981), Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e) (West 1973), and Section 1 of the Sherman Act, 15 U.S.C. § 1 (West Supp. 1987). As to each action, the complaint and Cooper affidavit fail to state a claim against Dow Jones, as a matter of law.

1. The Complaint Fails to State a Cause of Action Under the Antifraud Provisions of the Williams Act

In Counts I, II and III of the complaint, Cooper has alleged that Dow Jones violated the antifraud provisions of the 1934 Act, 15 U.S.C. § 78n(e) (West 1984). This provision is a general proscription against fraud in connection with tender offers. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 22-23 (1977). It is intended to protect shareholders in target companies by insuring that they have access to all material information before deciding whether to tender shares.

Here, no material information concerning a competing tender offer was withheld by Dow Jones since Cooper's offer of purchase was not a tender offer.[7] The term tender offer has not been defined by either Congress or this Court; however, the lower courts have developed two tests for determining whether a purchase offer is a tender offer.

The most widely accepted standard was first applied in *Wellman v. Dickinson*, 475 F. Supp. 783

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[7] Cooper lacks standing to bring a 1934 Act claim for damages, since he is at best only a disappointed offeror. Disappointed offerors do not have standing to bring claims for damages under Section 14(e). *Piper*, 430 U.S. at 35.

(S.D.N.Y. 1979) and holds that a tender offer is present whenever there is a public announcement of the offer and

> (1) active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer's stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares . . .; (6) offer open only a limited period of time; (7) offeree subject to pressuring to sell his stock.

Wellman, 475 F. Supp. at 823-24. *See SEC v. Carter Hawley Stores*, 760 F.2d 945, 952, 952 n.5 (9th Cir. 1985). *See also Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 56-57 (2d Cir. 1985). The second test, first applied in *S-G Securities Inc. v. Fuqua Investment Co.*, 466 F. Supp. 1114, 1126-1127 (D. Mass. 1987), finds a tender offer where a public announcement of a firm intention to purchase a large block of an issuer's shares is followed by rapid accumulation of shares by the offeror.

Both the *Wellman* and the *S-G Securities* tests recognize that one requirement of a tender offer is an express offer to purchase securities. Cooper's offer fails both tests as he never made a firm offer, rather he only articulated "plans" for "offers"[8] Pet. App.16, 47.

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[8] Indeed, Cooper has never indicated that he even attempted to purchase a single share of RCA stock. Application of the

2. The Complaint Fails to State a Cause of Action Under the Robinson-Patman Act

In Court IV of the complaint, Cooper charges that Dow Jones violated the Robinson-Patman Act, 15 U.S.C. § 13(e) (West 1973). There are four jurisdictional requirements in a Robinson-Patman Act claim: (1) two or more sales, (2) of commodities, (3) of "like grade and quality", (4) in commerce.[9] Here, two of these requirements are absent—this is a simple case of a seller declining to transact business with a single prospective buyer, not discrimination in price in two or more sales. Moreover, newspaper advertising is not a commodity.

Since the Robinson-Patman Act is intended to preclude price discrimination between two purchasers, and does not prevent a seller from choosing his customers, there is a jurisdictional requirement that the

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remaining elements of the *Wellman* test to Cooper's offer provides additional support for the conclusion that there was no tender offer. Cooper sought donations of less than 5% and would accept up to 80% of the shares of twenty-eight major corporations. He had no publicity or financing, offered no premium over the market price since he wanted the equity as a donation, and placed no meaningful time limit or other controls on his offer. Assuming *arguendo* Cooper made a tender offer that was material, the 1934 Act imposes no duty of publication on a newspaper, and the Dow Jones appellees were thus under no direct duty to publish the information at issue. Further, there was no implied duty to publish as a statute compelling a newspaper to publish that which it would not otherwise choose to print would be unconstitutional. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

[9] F. Rowe, *Price Discrimination Under the Robinson-Patman Act*, 36, 45-83 (1962)

plaintiff show actual discriminatory sales.[10] Here, the only facts alleged in the complaint establish a single decision not to sell to Cooper. Cooper has not pleaded price discrimination on two or more sales. Dow Jones simply chose not to sell space to Cooper, unless he, first, provided additional information about his program.

The Robinson-Patman Act applies only to commodities. Newspaper advertising is not a commodity under the act.[11] This view has prevailed in the District of Columbia circuit and generally in other courts that have addressed the issue.[12]

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[10] *See Bruce's Juices v. American Can Co.*, 330 U.S. 743, 755 (1947); *Bird and Son, Inc.*, 25 FTC 468, 470 (1937) ("[s]ection 2(e) does not prohibit a seller from choosing its customers and from refusing to deal with prospective purchasers to whom, for whatever reason, it does not wish to sell"); *H.A.B. Chemical Co. Inc. v. Eastman Kodak Co.*, 1981-1 Trade Cases CCH ¶ 63,912 at 75, 748 (C.D. Cal. 1980) ("refusals to deal are not actionable as discrimination under the Robinson-Patman Act"); Patman, *Complete Guide to the Robinson-Patman Act*, 83 (1963).

[11] 79 Cong. Rec. 9078-9079 (1935) (Rep. Patman reconfirmed his view that the act was not intended to apply to "magazine or other advertising space"); *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 609 n.27 (1953) (while reserving judgment, noting the government had conceded in oral argument that the Robinson-Patman Act did not apply to advertising space). *See*, F. Rowe, *Price Discrimination Under the Robinson-Patman Act*, 60-61 (1962).

[12] *National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81, 86 (D.D.C. 1977), *aff'd.* 595 F.2d 888 (D.C. Cir. 1979) ("newspaper advertising is not a 'commodity' within the meaning of the Robinson-Patman Act"). *Ambook Enterprises v. Time Inc.*, 612 F.2d 604, 609 (2nd Cir. 1979) *cert. dismissed*, 448 U.S. 914 (1980) (to regard newspaper advertising as a commodity under the Robinson-Patman Act would be "contrary to

3. The Complaint Fails to State a Claim Under the Sherman Act

In Count IV of the complaint, Cooper has alleged that Dow Jones violated Section 1 of the Sherman Act. Cooper charges the Dow Jones respondents with conspiring among themselves with another unnamed Dow Jones employee in refusing to sell him advertising space, and second, charges that Dow Jones, together with the RCA and GE respondents, conspired to restrain trade in RCA stock. Pet. App. 33-34.

Cooper alleges that Dow Jones engaged in a unilateral refusal to deal. The Sherman Act does not reach a unilateral act of restraint of trade or refusal to deal involving a single firm.[13]

Cooper's claim of a conspiracy to impede transactions in RCA stock is similarly insufficient. The Sherman Act is intended to protect commerce by prohibiting actions that restrain trade. See *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983). Thus, a judicially recognizable action for recovery for

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the ordinary reading of the language, [was] disavowed on the floor of the Senate, disclaimed by the statute's principal author two years after its passage, . . . and [would be] contrary to the consistent course of judicial decision on this and related matters . . . .") *Diamond v. World News Corp.*, 542 F. Supp. 887, 889 (S.D.N.Y. 1980).

[13] *Copperweld Corp. v. Independence Tube Corp.*, 476 U.S. 752, 768-769 (1984) ("[c]oordinated conduct among officers and employees of the same company" and the internally coordinated conduct of a corporation does not violate Section 1 of the Sherman Act); *Diamond*, 542 F. Supp. at 889 ("a unilateral refusal to deal, for any reason, is not actionable under Section 1.")

a conspiracy for violating the Sherman Act must include a claim that the plaintiff has suffered damages arising out of a restraint of trade. *Id.*

Here, the alleged antitrust conspiracy focuses on Dow Jones' refusal to publish an advertisement. Pet. App. 34. This refusal to publish is not alleged to have adversely impacted Cooper's ability to purchase RCA stock. *Id.* Accordingly, Cooper has failed to allege a necessary element in an action for a conspiracy to violate the Sherman Act. Thus, the Court of Appeals properly affirmed dismissal of this count pursuant to Rule 12(b)(6).

Conclusion

Cooper's application for a writ of mandamus, or, in the alternative, a writ of prohibition, should be denied. He has failed to establish that an extraordinary writ was the only available remedy or to show clear entitlement to the writ.

The Court of Appeals did not exceed it's jurisdiction or authority in disposing of this matter upon an order to show cause. Further, the court properly affirmed the judgment of the District Court, based on grounds supported by the record.[14] This application should be denied.

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[14] Pursuant to Supreme Court Rule 17.1 this case is not appropriate for review on certiorari. As evidenced by the Court of Appeals Memorandum of October 9, 1987, the issues presented in the instant action and the pending petition for an extraordinary writ may be resolved by the application of well settled principles of law and procedure.

Respectfully submitted

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